Supreme Court, U.S.
FILED
NOV 13 2003
OFFICE OF THE CLERK

No. 02-626

In The Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS BRIEF OF THE ASSOCIATION OF STATE WETLAND MANAGERS AND THE TROPICAL AUDUBON SOCIETY IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Association of State Wetland Managers ("ASWM") and the Tropical Audubon Society submit this brief *amicus curiae* in support of Respondents Miccosukee Tribe of Indians and Friends of the Everglades, Inc.[1]

ASWM is a nonprofit federal 501(c)(3) membership organization dedicated to the protection and management of the Nation's wetland resources. The goals of the Association include the following: translate wetland science into fair and reasonable government policies; help states develop and implement wetland regulatory and management programs; improve the coordination of wetland programs and policies at all levels of government; facilitate the integration of wetlands into water resources and watershed management; and build conservation and restoration partnerships among states, tribes, local governments, not-for-profits, and other interested parties.

The Tropical Audubon Society is a nonprofit conservation and education organization established in 1947 to protect the natural world, promote wise stewardship of natural resources and foster – among members and the public in general – an understanding and appreciation of nature and ecological relationships. Many of its members use and enjoy the Everglades for bird watching and other nature study oriented recreation.

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[1] Counsel for the parties consented to the filing of this brief and letters reflecting that consent are filed in the clerk's office. No counsel for a party in this case authored any part of this brief, and no person other than *amici* or their representatives made any monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.

SUMMARY OF ARGUMENT

This case has important implications for the restoration of the Everglades, one of the most unique wetland resources in the world. Half of the Everglades has already been destroyed by agricultural and urban development. The remainder is under assault from a variety of causes, but phosphorous is the major problem. Phosphorus is turning the fabled "River of Grass" into a dead zone where cattails are the "markers on the grave." Petitioner's stormwater management system, including the S-9 Pump Station ("S-9") at the center of this dispute, is feeding more and more phosphorous to an already overstressed ecosystem.

The question presented is whether the Clean Water Act ("CWA" or the "Act") requires Petitioner to obtain a National Pollutant Discharge Elimination System ("NPDES") permit to operate S-9. The answer to that turns on a very narrow question of whether the phosphorous that is undeniably being discharged from S-9 meets the technical definition of an "addition" under the Act. Plainly, it does.

Contrary to Petitioner's assertion that phosphorous simply "passes through" S-9 on its way to the Everglades, the purpose of S-9 is to force the polluted water to go where it would not otherwise go. S-9 is part of an elaborate stormwater and flood control system for Broward County. S-9 takes massive quantities of stormwater out of the C-11 canal ("C-11") and pumps it uphill, five to six feet, and into Water Conservation Area ("WCA")-3A, a section of the Everglades. The C-11 Basin and WCA-3A are physically separate water bodies, that are managed separately by the State of Florida under its water quality programs. Thus,

there is no merit to the "unitary waters" theory advanced by Petitioner, and unfortunately endorsed by the Solicitor General. The normal weight that ought to be accorded the Solicitor's view is inappropriate here because of the conflicting positions the United States has taken before this Court in other cases involving the same question.

Alternatively, S-9 should be regulated as a stormwater discharge under Section 402(p)(2)(E) of the CWA. That provision requires a NPDES permit for any stormwater discharge that is a "significant contributor of pollutants to the nation's waters." The record indisputably establishes that S-9 does exactly that. This constitutes an alternative ground for upholding the Eleventh Circuit's decision in *Miccosukee Tribe of Indians v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), or for remanding the case in the event the Court reverses on the primary ground.

Finally, and contrary to Petitioner's "sky is falling" assertions, regulation of S-9 under the NPDES program will strengthen, not weaken, the overall restoration effort for the Everglades. Indeed, requiring all point sources to reduce phosphorous discharges is exactly the medicine the Everglades needs to recover.

ARGUMENT

I. REDUCTION OF PHOSPHORUS IN THE EVERGLADES IS CRITICAL TO RESTORING THE ECOSYSTEM.

The greater Everglades ecosystem (the "Everglades") is an international treasure. However, anthropogenic loading of phosphorus is destroying the Everglades. J.A 165-68. Reducing the amount of phosphorus entering the

Everglades is crucial to the success of Everglades restoration programs. *See* J.A. 165-68. The NPDES program provides the necessary mechanism to reduce phosphorus loading in the Everglades.

A. The Everglades Is a Unique, Internationally Important Ecosystem.

Before humans interfered, water in the Everglades flowed independently of channels, rivers and other conveyances. The integrity of the Everglades depends on "sheet flow" – a wide, shallow flow of water that once originated near Orlando but now begins south of Lake Okeechobee. J.A. 178, 190-97. As the sheet flow moves south toward Florida Bay it creates a vast sawgrass wetland – the "River of Grass" immortalized by Marjory Stoneman Douglas – that is home to an overwhelming variety of habitats, flora and fauna. Marjory Stoneman Douglas, *The Everglades: River of Grass* 10 (1947). This is the only example of a sheet flow ecosystem in the world. Thomas E. Lodge, *The Everglades Handbook: Understanding the Ecosystem* 10 (1994).

In 1947, President Harry S. Truman captured the significance of the Everglades during his dedication of Everglades National Park ("ENP"):

> Here are no lofty peaks seeking the sky, no mighty glaciers or rushing streams wearing away any uplifted land. Here is land, tranquil in its quiet beauty, serving not as a source of water, but as the last receiver of it. To its natural abundance we owe the spectacular plant and animal life that distinguishes this place from all others in our country.[2]

ENP is the only national park in the Western hemisphere designated as an International Biosphere Reserve, a World Heritage Site, and a Ramsar Wetland of International Importance. J.A. 147 ¶ 14; National Park Service, *Everglades National Park: A Park In Danger*, *at* http://www.nps.gov/ever/eco/threats2.htm (last visited Nov. 4, 2003). However, the Everglades transcends the boundaries of ENP and contains ecologically important areas including Big Cypress National Preserve, Biscayne Bay National Park, Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Water Conservation Areas. *See* J.A. 30, 36; Peter Alden et al., *National Audubon Society: Field Guide to Florida* 417-31 (1998).

The Everglades, like other wetlands, performs many beneficial functions. As this Court has recognized, wetlands "filter and purify water draining into adjacent bodies of water [citation omitted] . . . slow the flow of surface runoff into lakes, rivers and streams and thus prevent flooding and erosion." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985). Water pumped into WCA-3A mixes with water in the Everglades. This water recharges the Biscayne Aquifer and municipal wells that serve South Florida's burgeoning population. J.A. 59, 109, 111, 117.

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[2] National Park Service, *Everglades National Park: Park Establishment*, *at* http://www.nps.gov/ever/eco/nordeen.htm (last visited Nov. 4, 2003).

Wetlands also "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing, and resting sites for aquatic . . . species [citation omitted]." *Riverside Bayview*, 474 U.S. at 135. ENP alone supports more than 1000 species of seed-bearing plants and 120 tree species. NPS, *Everglades National Park: A Park for the World, at* http://www.nps.gov/ever/presskit/heritage.htm. Over 60 of these species are endemic. Ramsar Convention on Wetlands, *The Annotated Ramsar List: United States of America, at* http://www.ramsar.org/profiles_usa.htm (last visited Nov. 4, 2003). The ENP is also home to 25 orchid species as well as a rich variety of amphibians and reptiles. Wetlands International, *A Directory of Wetlands of International Importance: Everglades National Park, at* http://www.wetlands.org/RDB/Ramsar_Dir/USA/US005D02.htm (last visited Nov. 4, 2003). Finally, the Everglades harbors at least 36 endangered or threatened species. *See* NPS, *Park for the World, supra*.

The Everglades is perhaps best known for its diverse bird population. Scientists have documented 400 naturally occurring species of birds within the Everglades. Lodge, *supra*, at 145. About 60 percent of these birds are migratory. *Id.* Life in the Everglades is dependent on pristine water quality. J.A. 165-68. Unfortunately, beginning in the late 19th century, the demands of southern Florida's growing human population compromised much of this critical habitat. In the past few decades, the numbers of wading birds nesting in rookeries has declined by 90 percent in the southern Everglades alone. *See* Donald L. DeAngelis et al., *Modeling Ecosystem and Population Dynamics on the South Florida Hydroscape* 246, *in The Everglades, Florida Bay and Coral Reefs of the Florida*

Keys: An Ecosystem Sourcebook (James W. Porter & Karen G. Porter eds., 2002) [hereinafter *Everglades Sourcebook*].

1. The Everglades Is an Extremely Sensitive Oligotrophic System.

Oligotrophic wetlands are characterized by hydric soils and water that are nutrient poor and rich in oxygen. J.A. 165-68. Historically, only a small amount of nutrients entered the ecosystem through rainfall. Lodge, *supra*, at 10. The biodiversity of the Everglades depends upon these nutrient poor conditions. J.A. 165-68. Phosphorus is the limiting factor on primary productivity (*e.g.* algal growth). J.A. 126, 165-68. Background levels of phosphorus in the pristine Everglades[3] are only five or six parts per billion (ppb).[4] J.A. 30. As a result, the flora of the Everglades is

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[3] Data taken from over 400 reports determined that a phosphorus standard of 10 parts per billion (ppb) would not be overly protective or below the natural background levels of the Everglades. Memorandum from Dan Scheidt, Senior Scientist, South Florida Initiative, to John H. Hankinson, Jr., Environmental Protection Agency Regional Administrator 9 (Jan. 19, 2001), *available at* http://www.epa.gov/region04/southflorida/miccosukee/newmemo.pdf (last visited Nov. 4, 2003). EPA approved the Miccosukee Tribe's request for 10 ppb as a specific protective standard for phosphorus in tribal portions of the Everglades. *See* Press Release, Environmental Protection Agency, EPA Approves Tough Phosphorous Limit for Tribal Waters in Everglades, *available at* http:www.epa.gov/Region4/oeapages/99press/052699.htm (last visited Nov. 4, 2003). However, phosphorus concentrations at the S-9 Pump Station are as high as 20-100 ppb. J.A 45.

[4] One drop of ink in an Olympic-sized swimming pool is the equivalent of one part of phosphorus per billion parts of water. Texas Natural Resource Conservation Commission, *What Is A Part Per Billion? at* http://www.tnrcc.state.tx.us/permitting/remed/site/ssdap/jonesroad/ppb_chart.pdf (last visited Nov. 4, 2003).

highly susceptible to the addition of phosphorus, which changes aquatic productivity. J.A. 165-68. These oligotrophic conditions, coupled with the interplay between topography and hydrology, are crucial to the structure, function and composition of the Everglades.[5] *See* Lodge, *supra*, at 10-16. Everglades habitats, and the biota which have evolved to fill these respective niches, are unique and each play an important role within the ecosystem. In particular, the sawgrass and periphyton communities are crucial to the ecological integrity of the Everglades.

a. Sawgrass.

Sawgrass comprises "65 to 70% of the total vegetation cover of the Everglades." Paul V. McCormick et al., *Effects of Anthropogenic Phosphorus Inputs on the Everglades* 91, *in Everglades Sourcebook, supra*. It is arguably the most characteristic flora in the Everglades. Lodge, *supra*, at 19. Sawgrass wetlands are sparsely vegetated and open, attracting a variety of wildlife ranging from invertebrates to wading birds. *See* Environmental Protection Agency, *South Florida Ecosystem Assessment Vol. 1 Final Technical Report Phase I, Monitoring for Adaptive Management: Implications for Ecosystem Restoration* 7-1, *available at* http://www.epa.gov/region4/sesd/reports/epa904r98002.html (last visited Nov. 4, 2003) [hereinafter *Ecosystem Assessment*]; Lodge, *supra*, at 35. The openness of sawgrass wetlands allows for gas exchange with the atmosphere,

[5] The topography of the Everglades decreases in elevation from 18 feet above sea level at Lake Okeechobee to sea level at the southern terminus of the Everglades. *See* Peter Alden et al., *National Audubon Society: Field Guide to Florida* 13 (1998).

promoting well oxygenated waters. *Id.* Sawgrass helps maintain water quality by filtering, diluting and removing excess nutrients. *See* William A. Niering, *National Audubon Society Nature Guides: Wetlands* 32-34 (1998). Sawgrass also helps purify the water by allowing for sheet flow movement. These wetland functions are essential for cleansing and replenishing the Biscayne Aquifer, which supplies most of the drinking water for southern Florida. *See Report to the Working Group of the South Florida Ecosystem Restoration Task Force, South Florida Ecosystem Restoration: Scientific Information Needs* 369 (1996), *available at* http://everglades.fiu.edu/taskforce/scineeds/sub9.pdf (last visited Nov. 7, 2003) [hereinafter *Task Force*]. When phosphorus is added to the Everglades, cattail stands, which thrive in nutrient rich conditions, multiply quickly and crowd out sawgrass. *See* J.A. 38-39, 165-68.

b. Periphyton.

Periphyton is an integrated community of benthic algae that cover plant stems and the soil surface of the Everglades. McCormick et al., *supra*, at 139; Lodge, *supra*, at 30-33. Periphyton is adapted to oligotrophic conditions and is used as a biological indicator species due to its sensitivity to changes in nutrient levels. *See* Lodge, *supra*, at 32-33; McCormick, *supra*, at 103. "Periphyton productivity oxygenates the water column" and influences nutrient cycling. *Ecosystem Assessment*, *supra*, at 5-2. Periphyton is also an important link in the complex Everglades food web. *See* Lodge, *supra*, at 31-32.

2. Development Has Destroyed Half of the Everglades and Now Threatens the Rest.

Since the 1880s, humans have destroyed 50 percent of the habitats that comprised the historic Everglades. *See Ecosystem Assessment, supra*, at 1-1. Prior to human alteration, virtually all of Florida to the south and southeast of Orlando was part of the greater Everglades ecosystem. J.A. 178, 190, 197. The historic Everglades extended over 99 miles in length and incorporated about 4000 square miles. Lodge, *supra*, at 10.

The integrity of the Everglades was further undermined by extensive modifications made under the Central and South Florida Project ("CSFP"). The CSFP changed the natural hydropattern – the "depth, timing, duration and distribution of surface water" in the Everglades. *Ecosystem Assessment, supra*, at 1-5. Because of changes to the hydropattern, the Everglades no longer resembles the Everglades that existed prior to the years of human modification. *Id.*

Today, the Everglades stretches from Lake Okeechobee, south to Florida Bay, west to Big Cypress National Preserve and east to the Atlantic Ocean. J.A. 170, 178, 197. Most of these surviving remnants of the Everglades are contained within the boundaries of ENP, Loxahatchee National Wildlife Refuge and the WCA-2 and WCA-3. Petitioner manages both WCA-2 and WCA-3. Even at its reduced size, the Everglades remains one the most extensive freshwater wetland systems in the United States. *Ecosystem Assessment, supra*, at 5-1.

B. Phosphorus Is Killing the Everglades and Endangering Water Supplies.

Adding phosphorus to the Everglades disrupts the entire structure and function of the Everglades, including the system's ability to purify water and recharge groundwater. J.A. 59, 165-68. The Biscayne Aquifer, which is "one of the most permeable aquifers ever investigated and probably the most permeable water-table aquifer in the world," is particularly affected. *Task Force, supra,* at 369. "Because of the Biscayne Aquifer's shallow depth and permeability, groundwater contamination is a constant threat. . . ." *See Id.* at 382.

The drainage projects also reduce freshwater saturation and allow saltwater to encroach and contaminate the aquifer. J.A. 59, 109, 111; *see* United States Geologic Survey, *An Overview of the Southern Inland and Coastal System Project of the U. S. Geological Survey South Florida Ecosystem Program* 1, 2 (2000), *available at* http://time.er.usgs.gov/whnew/v2n1/overview/overview.pdf (last visited Nov. 3, 2003). Therefore, not only has the Everglades purifying capacity been diminished, but the groundwater is at risk of contamination from saltwater intrusion. This is only one of many examples of the cascading effects of phosphorus introduced by point sources such as S-9.

When phosphorus is added to the system, nutrient cycling is disrupted because periphyton productivity and microbial respiration are destabilized. J.A. 14, 126-27; McCormick et al., *supra*, at 101-103. This imbalance creates a deficit of dissolved oxygen in the water when eutrophic cyanobacteria, green algae and diatoms replace oligotrophic cyanobacteria, blue-green algae and diatoms.

J.A. 127; McCormick et al., *supra*, at 103. This imperceptible change in nutrient cycling rates is the beginning of a tremendous cascading effect throughout this oligotrophic ecosystem. It only takes between 10 and 20 ppb of phosphorus before periphyton function is disrupted. J.A. 31. As eutrophic cyanobacteria proliferates, the composition of the water body becomes dominated by species tolerant of low dissolved oxygen. Cattails – which thrive in nutrient enriched, poorly oxygenated waters – replace sawgrass, which further disrupts nutrient cycling. J.A. 38-39.

> Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and the periphyton and the sawgrass do. The majority of the cattail discharges oxygen to the atmosphere because the majority of the plant is above the water. The stems of those cattail plants are very dense, . . . and they have a tremendous shading effect on the sunlight that gets down to the water surface within the stand so that the amount of light that's necessary for photosynthesis, if there were plants and periphyton there to observe that light to produce oxygen during the photosynthetic cycle, that light's been reduced significantly. The cattails also grow very fast, and as they grow, they shed some of their leaves. That forms a dense mat of material in the water column, and that's being partially decomposed by bacteria. The bacteria use up what remaining oxygen is in the water so that most of the time there's zero for 15, 18, 20 hours a day . . . inside the cattail stand it's anaerobic. You won't find any fish there, you won't find any aquatic bugs that fish feed on, and it's a pretty nasty place.

Id. (statement of Dr. Timothy Bechtel, Sr. Supervisory Environmental Scientist, Department of Water Resources Evaluation, SFWMD). As a result, cattails are referred to as "markers on the grave of the Everglades." Neil Santaniello, *'Glades Element at Center of Dispute: Life-Giving Phosphorus Carries Dangers*, Sun-Sentinel, May 25, 2003, at A1 (quoting Dr. Ronald Jones)[6], *available at* LEXIS, US Newspapers.

Cattails are spreading throughout the Everglades. Large areas of northeastern WCA-3A and areas north of S-9 are being invaded by cattails. South Florida Water Managment District, *Central Everglades, at* http://www.sfwmd.gov/org/wrp/wrp_evg/2_wrp_evg_glades/central.html (last visited Oct. 16, 2003). WCAs show invasion of cattail stands in areas that used to be strictly sawgrass. J.A. 165-68. However, there is a delay between the time phosphorus enters the system and the appearance of cattails.

The lag time between the onset of phosphorus enrichment and cattail response can be as long as several decades. McCormick et al., *supra*, at 109. By the time the effects are visible, the damage is done. We are only beginning to see the destruction that will occur due to excessive amounts of phosphorus in the Everglades. This destruction is irreversible. J.A. 168.

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[6] Dr. Ronald Jones, of Florida International University, is "a water quality expert, including water quality in wetland systems (especially oligotrophic systems, such as the Florida Everglades)." J.A. 164.

C. Petitioner's Stormwater Collection System Is a Significant Source of Phosphorous.

Petitioner operates an extensive system of canals and levees that collects runoff from the C-11 Basin in Broward County. *Id.* at 7-11. For a map of the C-11 Basin, see App. 1. Through this system of canals, Petitioner controls stormwater from residential, urban and agricultural areas. J.A. 109. This system collects and channels massive quantities of destructive, phosphorus-enriched stormwater into the Everglades. S-9 discharges this phosphorus laden stormwater directly into WCA-3A. J.A. 98.

S-9 and C-11 are located in the C-11 Basin. Pet. Br. at 10. The United States Army Corps of Engineers ("COE") created the C-11 Basin, which encompasses 104 square miles, to "compartmentalize waters for management purposes." *Id.* The C-11 Basin was once part of the Everglades, but the COE converted it to "dry land" and it is now highly urbanized and industrialized. *Id.*

C-11 is an artificially created canal that runs from the Atlantic Ocean to WCA-3A. Pet. Br. at 10. WCA-3A is the portion of the Everglades that initially receives the polluted runoff from S-9. Stormwater runoff from the C-11 Basin is collected into C-11. *Id.* at 11. The water in C-11 contains higher levels of phosphorus than that which naturally occur in WCA-3A. Pet. App. 5a. As a result of the high levels of phosphorus, the Florida Department of Environmental Protection ("FDEP") listed C-11 as a water quality limited segment on its Section 303(d) list.[7] Florida

[7] The CWA requires states to identify waters that do not meet applicable water quality standards, and identify the pollutants causing

(Continued on following page)

Department of Environmental Protection, 1998 303(d) Report 32-33, *available at* http://www.dep.state.fl.us/water/tmdl/docs/303(d)-2.pdf 303 (last visited Nov. 3, 2003). Petitioner typically maintains the water level in C-11 between zero and four feet NGVD[8]. J.A. 71.

WCA-3A is also an artificial waterbody created by the COE. Pet. Br. at 8. WCA-3A is part of one of "three interconnected reservoir areas" that impounds water. Pet. Br. at 8. Levees L-33 and L-37, also projects of the COE, separate WCA-3A from, and maintain the water in WCA-3A at levels higher than, C-11. Pet. Br. at 8-9. Petitioner maintains the water elevation in WCA-3A at a level between 9.5 feet and 10.5 feet NGVD, which is at least five feet higher than the water level in C-11. *See* SFWMD, *Ecological Impacts of Drought in the Water Conservation Areas* 2 (Apr. 13, 2001), *available at* http://www.sfwmd.gov/org/wrp/wrp_evg/reports/drought_0401/generalinfo.pdf (last visited Nov. 9, 2003). WCA-3A is also listed as an impaired water on Florida's Section 303(d) list. 1998 303(d) Report, *supra*, at 33.

S-9 is an industrial-scale operation that is capable of moving water at a rate of 2,880 cubic feet per second (cfs).

the water quality threats. 33 U.S.C. § 1313(d)(1)(A)-(B). The waters identified by the states are referred to as water quality limited segments ("WQLS"), 40 C.F.R. § 130.2(j), and Section 303(d) of the CWA requires states to provide a list of WQLS to EPA (known as a § 303(d) list). C-11, also identified as the South New River Canal (waterbody identification # 3277A), is impaired as to nutrients, coliforms and dissolved oxygen. Florida Department of Environmental Protection, 1998 303(d) Report 33, *available at* http://www.dep.state.fl.us/water/tmdl/docs/303(d)-2.pdf 303 (last visited Nov. 3, 2003).

[8] "NGVD" means National Geodetic Vertical Datum.

J.A. 90. See App. 2 for a photograph of S-9. This rate exceeds the rate of flow of the St. John's River, one of the largest rivers in Florida. *See* USGS, *Calendar Year Streamflow Statistics for Florida*, *available at* http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02232400&agency_cd=US (last visited Nov. 3, 2003). When the water level in C-11 reaches four feet NGVD, or when heavy rainfall is predicted, Petitioner activates S-9, which pumps the stormwater across 60 feet of levees from east to west, reversing the natural flow of water, out of C-11, uphill, into WCA-3A. J.A. 54, 70-72, 90, 132-33.

Phosphorus-enriched water from C-11 contaminates water and soils on either side of S-9. J.A. 125-26. "Concentrations [at S-9] range from less than 20 parts per billion at low flows to *greater than 100 parts per billion* at high flows." J.A. 45 (emphasis added). S-9 discharged 5.4 metric tons of phosphorus in 1997 alone. J.A. 43. The areas surrounding S-9 are polluted. According to Dr. Jones: "The phosphorus concentrations are at their maximum levels. They can't get any higher than they are." J.A. 126.

An ecosystem already under stress is being further damaged by Petitioner's system of canals, levees and pumps that discharge phosphorus into the WCAs. J.A. 97, 98. Best management practices are not a panacea. Dr. Jones challenges: "[i]f anybody can demonstrate to me or find any place in the world where BMP has reduced the phosphorus concentration. . . . I would love to see it . . . it will not be enough." J.A. 123-24.

II. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT S-9 REQUIRES A NPDES PERMIT UNDER § 301(a) OF THE CWA.

The central objective of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2003). To achieve this goal, Congress prohibited the discharge of any pollutant to navigable waters except in compliance with applicable permit requirements. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" is defined in Section 502(12) and means "*any* addition of any pollutant to navigable waters from any point source." § 502(12); 33 U.S.C. § 1362(12) (emphasis added). Although Congress defined the terms "pollutant," "point source" and "navigable waters," it did not define "any addition." Thus, what constitutes an "addition" of a pollutant must be determined by a review of the facts of each case. *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994).

A. S-9 Is a Point Source.

The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). No party disputes S-9 is a point source.[9]

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[9] Petitioner relies on *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Fed'n v. Consumers Power Co.*, 862 F. 2d 580 (6th Cir. 1988), for the proposition that S-9 does not add pollutants to waters of the United States. Pet. Br. at 27. However, this reliance is misplaced as the definitive question in *Gorsuch* and

(Continued on following page)

Pet. Br. at 2. Recognizing the goal of controlling pollution "at the source," courts have interpreted "point source" to mean any discernible, human-controlled structure, device or operation that adds pollutants to water.[10] EPA further defines "discharge of a pollutant" to include "surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2 (2003).

B. C-11 and WCA-3 Are Physically Separate Waterbodies.

1. Petitioner's Unitary Waters Theory Does Not Hold Water.

Petitioner does not dispute that C-11 and WCA-3A are waters of the United States. Pet. Cert. at 2. Petitioner argues instead that "the unique system of hydrologically connected surface and ground waters extending over 15,000 square miles in the Everglades," Pet. Br. at 6, is

Consumers Power was whether EPA's determination that dams should be categorized as nonpoint sources rather than point sources was entitled to deference. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 280 F.3d 1364, 1368 n.4 (S.D. Fla. 2002) (citing *Consumers Power*, 862 F. 2d at 584 and *Gorsuch*, 693 F. 2d at 175). Here, by contrast, EPA has not made a similar determination that pumping stations are not point sources.

[10] *See, e.g., Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (holding "diffuse run-off" that is channeled or collected is a point source); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (finding a culvert is a point source); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45-46 (5th Cir. 1980) (holding strip mining operation is a point source where rain erodes waste pile and carries away pollutants through naturally created ditches).

"part of a single navigable water." Pet. Br. at 46. By this logic, the Atlantic Ocean and the Everglades could be considered part of the same "unitary water," allowing Petitioner to pump saltwater into the Everglades without triggering the CWA.[11] Congress could not have intended such anomalous results.

2. Florida Manages C-11 and WCA-3A as Separate and Distinct Waterbodies.

The State of Florida classifies C-11 and WCA-3A as separate waterbodies for purposes of watershed planning.[12] The Everglades is divided into different basins and waterbodies in recognition of the fact that water quality differs among the basins and therefore must be individually assessed and managed. FDEP, Florida's Water Quality Assessment 2002 305(b) Report 40, *available at* http://

[11] *Northern Plains Res. Council v. Fidelity Exploration & Prod. Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3148, 72 U.S.L.W. 3277, 72 U.S.L.W. 3280 (U.S. Oct. 20, 2003) (No. 03-257). In that case energy companies were pumping groundwater containing naturally occurring pollutants out of coal seams and discharging it into surface waters. The Ninth Circuit held that the unaltered groundwater was a pollutant that was added to another water body thereby triggering the permit requirements of the CWA.

[12] The Florida Water Plan is the FDEP's "principal planning tool for long-term protection of Florida's water resources." FDEP, Florida Water Plan: Implementing Watershed Management 1 (Dec. 2001), *available at* http://www.dep.state.fl.us/water/waterpolicy/docs/FWP_ Dec_ 2001_DO_NOT_EDIT.pdf. To implement this plan, FDEP divided the state's waters into 52 basins and those basins into 30 groups. EPA Region 4, Decision Document Regarding Department of Environmental Protection's § 303(d) List Amendment 4, *available at* http://www.epa.gov/region4/water/tmdl/florida/florida303d_update.pdf (last visited Nov. 4, 2003) [hereinafter 2003 303(d) Update].

www.dep.state.fl.us/water/docs/2002_305b.pdf (last visited Nov. 5, 2003). This management framework would be meaningless if all of the water within the Everglades was in fact one waterbody.

3. S-9 Pumps Stormwater Uphill from C-11 into WCA-3A.

S-9 moves massive quantities of water from C-11 into WCA-3A. Petitioner's system collects and controls stormwater in C-11. When the waters rise to four feet NGVD, as many as three S-9 pumps, powered by "large bulldozer engines," J.A. 153, with a combined velocity of 2880 cfs, kick on, lifting massive amounts of water up five to six feet, across 60 feet of levees, into WCA-3A. J.A. 72, 90, 132, 172. Contrary to Petitioner's assertion, this is not simply the passive movement of water from one place to another. Rather, it is the use of brute force to defy gravity, and reverse the natural flow of polluted stormwater from east to west into the Everglades.

C. S-9 Adds Pollutants to Waters of the United States.

There is no question that phosphorous is a "pollutant," or that S-9 is a "point source," or that WCA-3A is a "water of the United States." Nor is there any doubt that phosphorous levels in WCA-3A are increasing as a result of the stormwater being pumped through S-9. Thus, the sole question is whether the fact that phosphorous is already in the stormwater before it is discharged through S-9 has any legal significance. Petitioner argues that the pollutant must originate "from" a point source. Pet. Br. at 26-27. For the following reasons, this argument lacks merit.

1. Plain Meaning of Addition.

Congress did not define "addition" in the CWA. Thus, it is appropriate to consider the plain meaning of "addition." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citing *F.M.C. Corp. v. Holliday*, 498 U.S. 52, 57 (1990)). The primary definition of "addition" is "the result of adding: anything added: INCREASE, AUGMENTATION." Webster's Third New International Dictionary (1971). S-9 *increases* phosphorus levels in WCA-3A above natural background levels. J.A. 35. Therefore, according to the plain meaning of the word "addition," the operation of S-9 results in the addition of a pollutant to WCA-3A.

2. Petitioner's Argument Distorts the Plain Meaning of Addition.

Petitioner argues that a discharge occurs only "when the pollutant originates from the point source, not when pollutants originating elsewhere are merely passed through." Pet. Br. at 26-27. This position is wrong as a matter of law and fact. First, there is nothing in the statute that requires that pollutants must "originate" in the point source. To the contrary, Congress broadly defined point source to mean any "confined and discrete conveyance." 33 U.S.C. § 1362(14) (emphasis added). Petitioner is attempting to put words into the statute that are not there.

Second, the Solicitor General rejected this interpretation, stating that the Eleventh Circuit "correctly rejected the notion that pollutants can be added 'from' a point source only if the point source itself generates or is the originating source of the pollutants." United States Br. at

13. Petitioner's argument would render Congress' definition of "point source" superfluous and attempts to backpedal from the admission that S-9 is a point source. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (holding Court is unwilling to adopt interpretations which render superfluous another portion of the same law).

Finally, it is not true that phosphorous simply "passes through" S-9 on its way to WCA-3A. In the absence of Petitioner's stormwater collection system and S-9, this phosphorous would be headed for the Atlantic Ocean. It defies common sense to argue there is no addition of phosphorous to the Everglades as a result of this human-controlled point source.

3. The Solicitor General Has Taken Inconsistent Positions on the "Addition" Issue.

After correctly disposing of the point source question, the Solicitor erroneously argues that there is no addition of phosphorous here because the Everglades is just one big water body. United States Br. in Opp'n Cert. at 13. Previously the United States has argued for a broad application of the term "addition" in CWA cases involving discharges of dredge and fill material under Section 404.[13] Just last

[13] *See United States v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000), *aff'd on reh'g*, 332 F.3d 698 (4th Cir. 2003) ("sidecasting" of dredge materials into wetlands constitutes "addition"); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1503-06 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part*, 848 F.2d 1133 (11th Cir. 1988) (backwash from propellers constitutes "addition");
(Continued on following page)

term, for example, the Solicitor took the position in this Court that the "deep-ripping" of wetlands resulted in the addition of pollutants to waters of the United States, notwithstanding the fact that the pollutants did not originate outside the wetlands. *Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002). The petitioners in *Borden Ranch* argued that plowing wetlands did not involve any "addition" of a pollutant requiring a permit under Section 404 of the CWA "because their activities merely 'turn soil in place while adding nothing and redepositing nothing.'" *Brief for the Solicitor General at* 26, *Borden Ranch v. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (No. 01-1243). The Solicitor argued this proposition was "wrong as a matter of fact and as a matter of law." *Id.* at 25. Especially relevant is the following statement: "[p]etitioner's suggestion that a 'discharge' does not occur unless the 'addition' constitutes 'new materials' transported from a distant site cannot be reconciled with the Clean Water Act's terms." *Id.* at 27.

The same is true for S-9. The Solicitor's suggestion that there is no addition of phosphorus because the Everglades is one waterbody amounts to an argument that the definition of addition is different for purposes of Section 404 than it is for Section 402. Such a position "cannot be reconciled with the Clean Water Act terms." *Id.* at 25. Congress used a single definition of discharge for both the Section 402 and Section 404 programs. The Solicitor's position confuses what is a well-settled area of the law.

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923-25 (5th Cir. 1983) (mechanized land clearing constitutes "addition").

Further, the Solicitor's argument is inconsistent with the way EPA and FDEP actually implement the CWA in Florida. For example, Petitioner operates four Stormwater Treatment Areas ("STA"). SFWMD, 2003 Everglades Consolidated Report 4A-2 (Jan. 1, 2003). STAs treat stormwater to reduce the levels of phosphorus and then discharge the treated stormwater into the Everglades. *Id.* at 8B-17, 4-4. Recognizing that discharges from the STAs are a significant source of phosphorus in the Everglades, FDEP identified the STAs as Publicly Owned Treatment Works ("POTW") and issued NPDES permits to authorize the discharge of phosphorus by the STAs into the Everglades.

Unlike the STAs, Petitioner does not reduce the amount of phosphorus in C-11 before S-9 pumps the water into the Everglades. Because FDEP (and EPA, in its NPDES approval process) acknowledges that treated water discharged by the STAs constitutes the addition of a pollutant, Petitioner's position that the untreated stormwater pumped by S-9 does not constitute the addition of a pollutant is unsound.

III. ALTERNATIVELY, S-9 SHOULD BE REGULATED AS A STORMWATER DISCHARGE UNDER 402(p)(2)(E).

In 1987, Congress amended the CWA and created a program to address stormwater[14] from agricultural, residential and industrial runoff. 33 U.S.C. § 1342(p).

[14] Stormwater is defined by the EPA as "storm water runoff, snow melt runoff, and surface runoff, and drainage." 40 C.F.R. § 122.26(b)(13).

Specifically, Congress determined that stormwater discharges should be controlled through the NPDES program. *Id.* Notably, Congress chose to include in this program discharges "for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E).

The express intent of Congress was to prohibit stormwater pollution through readily identifiable sources. 33 U.S.C. § 1342(p)(2)(A)-(D). Congress also recognized that this expansive approach would not address all sources of stormwater discharges. To ensure the program retained the requisite flexibility to achieve its goal, Congress enabled the Administrator or the State agency to designate other discharges on a case by case basis. 33 U.S.C. § 1342(p)(2)(E).

When designating a discharge under Section 402(p)(2)(E), the EPA guidelines state that:

> At a minimum Regions and States should consider *immediately designating* any storm water discharges as requiring an NPDES permit if the discharges are known/suspected to: . . . contribute significant amounts of pollutants to waters of the United States, *including sensitive wetlands, drinking water sources, estuaries, lakes, scenic rivers/streams, or near coastal areas that are highly valued natural resources.*"

Memorandum from James R. Elder, Director, Office of Water Enforcement Permits, Environmental Protection Agency 3 (Aug. 8, 1990) (emphasis added), reproduced at App. 3-21a. EPA also found that the "305(b) reporting process

is a critical source of information for making determinations under the authority of 402(p)(2)(E)." *Id.*

Through its Section 303(d) and 305(b) reporting requirements, FDEP has made a *de facto* determination that the stormwater pumped by S-9 into WCA-3A contributes to a violation of water quality standards. Therefore, a NPDES permit is required for S-9 under Section 402(p)(2)(E). S-9 discharges stormwater collected in C-11 into WCA-3A, which is a sensitive wetland, drinking water source, and a near coastal area that is a highly valued natural resource. J.A. 72. In fact, FDEP's 2002 305(b) Report lists the WCA as the first of the "largest and most important" wetlands in the state. 2002 305(b) Report, *supra*, at 73. Because WCA-3A is impaired as to phosphorus, any discharge of water containing phosphorus to WCA-3 contributes to a violation of Florida water quality standards. 1998 303(d) Report, *supra*, at 33. Therefore, Petitioner's discharge of stormwater via S-9 into WCA-3A is a discharge that must be regulated pursuant to Section 402(p)(2)(E) of the Act.

IV. REGULATION OF S-9 IS COMPATIBLE WITH THE TMDL PROGRAM.

Petitioner also argues that the projects created to comply with the CWA's TMDL program "deal with the pollution problems caused by the S-9 and its related structures on a watershed wide basis" and that "[t]hese efforts are now in jeopardy of being trumped, their implementation at least seriously delayed, by a federal NPDES permitting process." Pet. Br. at 37. These statements are wrong as a matter of fact and law.

First, the NPDES program plays an integral part in the TMDL program and contributes to achieving water quality standards; any proposition that the NPDES program would harm the TMDL program is erroneous. Second, the "programs" the State and the District have established to "deal with the pollution problems caused by the S-9 and its related structure," Pet. Br. at 37, are not scheduled to be implemented for WCA-3A and the C-11 Basin until 2009. *See* EPA Region 4, Decision Document Regarding Department of Environmental Protection's 2003 § 303(d) List Amendment 4, *available at* http://www.epa.gov/region4/water/tmdl/florida/florida303d_update.pdf (last visited Nov. 4, 2003) [hereinafter 2003 303(d) Update].

Under the Florida Water Plan ("FWP") Florida designated WCA-3A and C-11 as "low priority" for purposes of TMDL implementation. Therefore, implementation of programs to address the continued pollution problems will not begin until 2009, at the earliest. 2003 303(d) Update, *supra*, at 4. Therefore, Florida's adoption of the FWP to implement the TMDL program will allow continued degradation of impaired water bodies until at least 2009. Because FDEP has identified the waterbodies of concern as water quality limited segments,[15] any additional loading of phosphorus is a violation of water quality standards and the CWA.[16] Such approach cannot, in good faith, be

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[15] According to the 1998 303(d) Report, C-11 (also known as South New River Canal) and a number of waterbodies within WCA-3A are listed as WQLS. The parameters (or pollutants) of concern are nutrients. 1998 303(d) Report 32-33. *See supra* note 7.

[16] 40 C.F.R. § 131.12 (containing the antidegradation policy).

described as a solution to the continued pollution problems caused by S-9.

Restoration of the Everglades requires a concerted effort by both state and federal governments. Petitioner agrees the area is undergoing devastating change due to phosphorus loading. It is incumbent upon all levels of government to employ whatever means are available to ensure the goal of protection is attained. However, the State and Petitioner in particular, have not employed all available mechanisms to address the devastation to the Everglades. The CWA requires S-9 be permitted under the NPDES program, which will allow Everglades restoration to begin in earnest by reducing phosphorus loading. The goal of the Clean Water Act is clear, and "the whole world is watching" to see if Everglades restoration will succeed. NPS, *Everglades National Park: Park Establishment, at* http://www.nps.gov/ever/eco/nordeen.htm.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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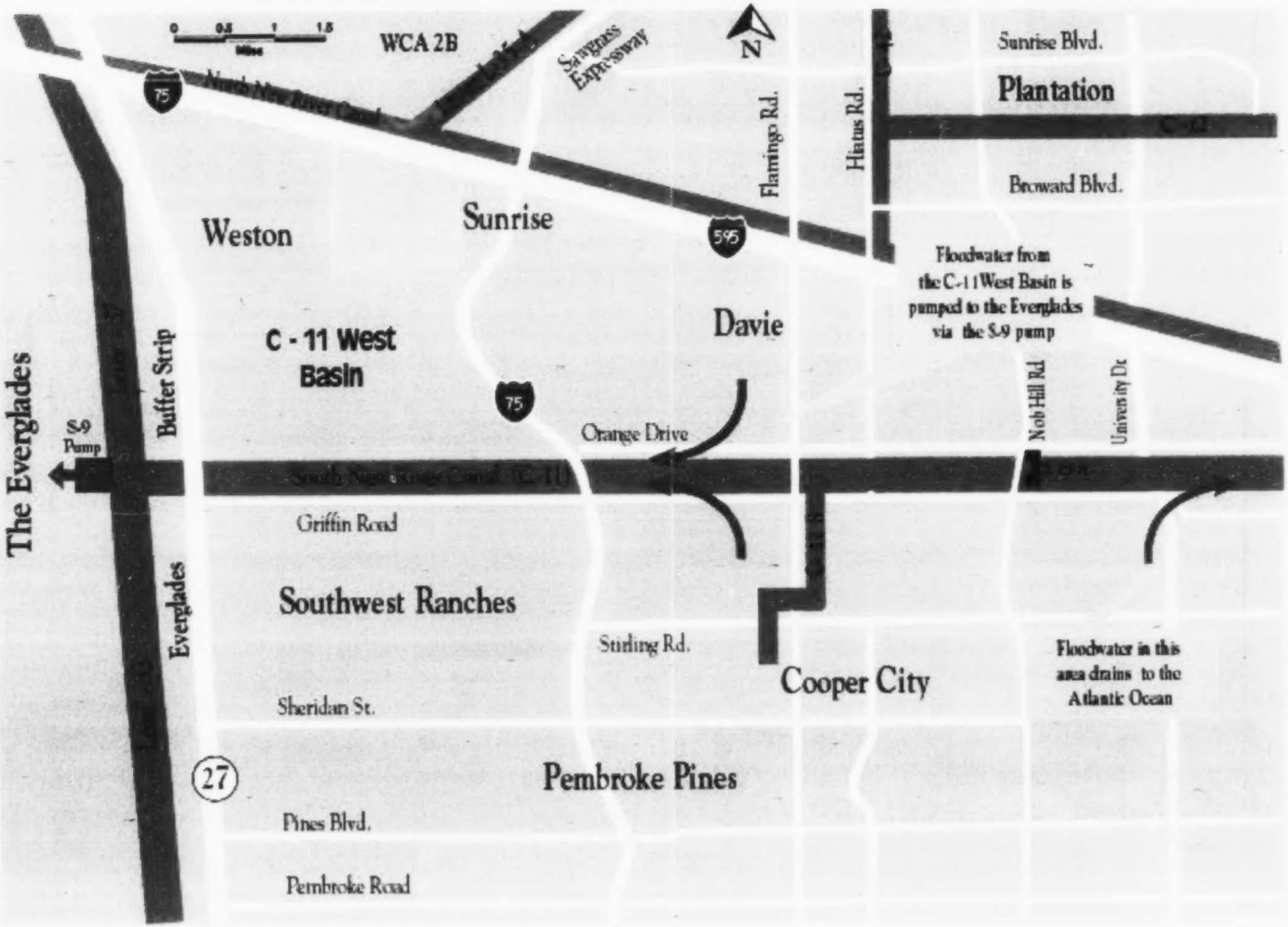
[17] Counsel wish to recognize the extraordinary effort of student clinicians Jason Hamilton, Spencer G. Hanes, Jr., Heidi Keeler Holland and Marguerite McConihe in the preparation of this brief.

C-11 WEST CANAL IN CENTRAL BROWARD COUNTY



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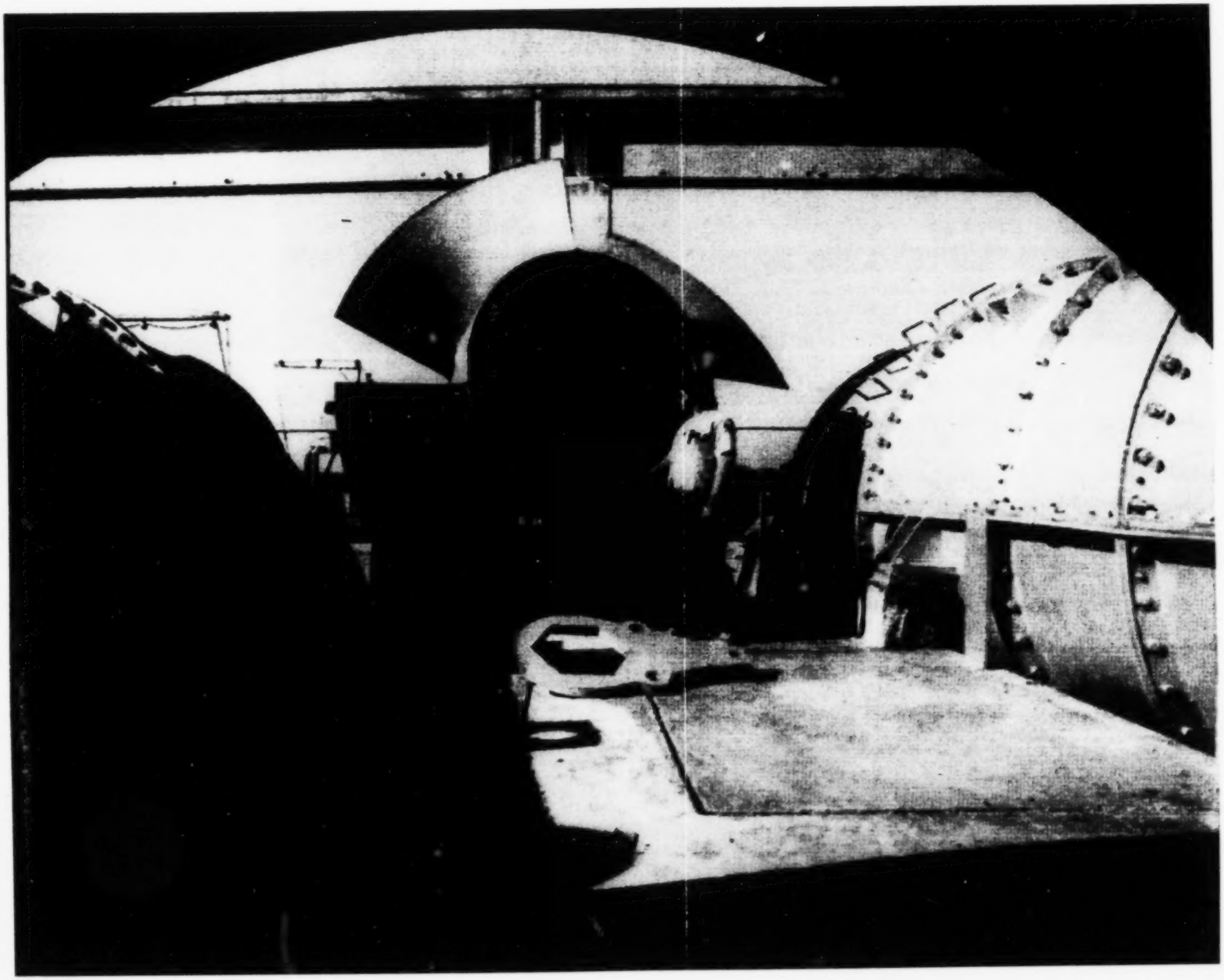

[LOGO] ATTACHMENT AVAILABLE UPON REQUEST

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

Aug – 8 1990

MEMORANDUM

SUBJECT: Designation of Storm Water Discharges for Immediate Permitting

FROM: /s/ James R. Elder

James R. Elder, Director

Office of Water Enforcement and Permits

TO: Water Management Division Directors

Regions I – X

NPDES State Directors

The Water Quality Act of 1987 (WQA) provides EPA and NPDES States with new deadlines for the development of NPDES permit requirements for storm water and discharges. This memorandum is intended to inform Regional and State offices of the authority under the Act to continue or initiate efforts to permit storm water discharges that are causing environmental problems.

Background

Section 405 of the WQA amends the Clean Water Act (CWA) by adding section 402(p) to address storm water discharges. The Act provides a moratorium for certain storm water discharges from the requirement to obtain

permits until after October 1, 1992. However, there are specific exceptions to this moratorium:

(A) A discharge with respect to which a permit has been issued under section 402 before the date of enactment of section 402(p).

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more, but less than 250,000.

(E) A discharge for which the Regional Administrator or the State Director, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

The existing delegation of authority to Regional Administrators to issue and condition permits or to deny applications for permits for discharges pursuant to section 402 of the Clean Water Act includes the authority to implement section 402(p)(2)(E) (Delegations Manual 7/25/84, 2-20 NPDES). This authority may be redelegated to the Directors of the Regional Water Divisions, subject to the provisions of the 40 CFR 124 and 125.

Section 402(p)(2)(A) preserves the ability to enforce existing permits. On December 7, 1988 (53 *FR* 49416), EPA issued a notice of proposed rulemaking (NPRM) addressing permit application requirements for discharges

covered by sections 402(p)(2)(B) through (E). This memorandum will discuss implementation of section 402(p)(2)(E).

Discussion

Although EPA is currently amending regulatory requirements for permit applications for industrial and municipal storm water discharges, some storm water discharges have already been identified as representing significant sources of pollutants with discernible adverse effects on water quality and should be regulated through the permits program now. Regional Offices and NPDES approved States should designate those storm water discharges for permit issuance under the authority of section 402(p)(2)(E) as soon as possible after their impact is documented.

Storm water dischargers required to obtain an NPDES permit under section 402(p)(2)(E) can include dischargers from any conveyance or system of conveyances used for collecting and conveying storm water runoff including municipal separate storm sewer systems, storm water dischargers associated with industrial activity, and other dischargers from a point source. To be designated for a permit under section 402(p)(2)(E), the Administrator, or in States with approved NPDES programs, the Director, must determine that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

Section 502(14) of the CWA defines the term "point source" broadly to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure,

container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." Many courts have supported broad interpretations of this term, for example, the court in *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41 (5th Cir. 1980) found that conveyances formed either as a result of natural erosion or by material means, and which constitute a component of a drainage system, were point sources.

However, it should be noted that agricultural storm water discharges and return flows from irrigated agriculture are specifically excluded from the CWA definition of point source, and cannot be designated for a permit under section 402(p)(2)(E). In addition, Section 402(1)(2) prohibits EPA from requiring an NPDES permit for discharge of storm water runoff from mining operations or oil and gas operations composed entirely of storm water which is not contaminated by contact with, or does not come into contact with any overburden, raw material, intermediate products, finished product, by-product or waste products located on the site of such operations. Storm water discharges from mining operations or oil and gas operations which meet the criteria of section 402(p)(2)(E) as being either a significant contributor of pollutants to waters of the United States or contributing to a water quality standard violation either will be contaminated by contact with, or will have come into contact with overburden, raw material, intermediate products, finished product, by-product or waste products located on the site of such operations.

At a minimum, Regions and States should consider immediately designating any storm water discharges as

requiring an NPDES permit if the discharges are known/suspected to:

1. Contribute to a violation of a water quality standard for a waterbody segment listed under section 304(l)(1)(B), or contribute significant amounts of pollutants to any waterbody segment listed under sections 304(l)(1)(A), 319(a)(1), or 314(a)(1)(F)[1].

2. Contribute significant amounts of pollutants to waters of the United States, including sensitive wetlands, drinking water source, estuaries, lakes, scenic rivers/streams, or near coastal areas that are highly valued natural resources.

3. Originate from municipal separate storm sewer systems that have, or are suspected of having, process waste or sanitary wastes discharged to them.

4. Originate from municipal separate storm sewer systems that are suspected of containing a significant contribution of pollutants.

The four categories presented include (but are not limited to) discharges which require storm water permits. Each category is described and further clarified using example case histories categorized in the following pages.

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[1] Many discharges of pollutants associated with urban runoff, construction, mining, agricultural (feedlots), and waste disposal have traditionally been considered nonpoint sources. However, legally, storm water from these sources discharged through conveyances are point sources under the CWA.

1. **CONTRIBUTE TO A VIOLATION OF A WATER QUALITY STANDARD FOR A WATERBODY SEGMENT LISTED UNDER SECTION 304(l)(1)(B), OR CONTRIBUTE SIGNIFICANT POLLUTANTS TO ANY WATERBODY SEGMENT LISTED UNDER SECTIONS 304(l)(1)(A), 319(a)(1), OR 314(a)(1)(F).**

   A. Contribute to a violation of a water quality standard for a waterbody segment listed under section 304(l)(1)(B), or contribute significant amounts of pollutants to any waterbody segment listed under section 304(l)(1)(A).

Section 304(1) of the CWA requires States to develop three lists of related waters impaired by toxic and nontoxic pollutants. The first list (section 304(l)(1)(A)(i)) includes waters that will not achieve numeric water quality standards for the 126 priority pollutants identified as toxic pursuant to section 307(a) of the CWA after application of CWA technology-based requirements. The second list (section 304(l)(1)(A)(ii)) is a comprehensive list of waters impaired by any pollutant from any source such that the water is not meeting the *goals of* the CWA after application of technology-based requirements. The section 304(l)(1)(B) list consists of those waters which, after application of technology-based requirements, are not expected to achieve numeric or narrative water quality standards due entirely or substantially to point source discharges of any of the 126 priority toxic pollutants. The fourth list (section 304(l)(1)(C)) is a list of point sources affecting the waterbodies on the section 304(l)(1)(B) list. On this fourth list, States must identify the specific point sources discharging the toxic pollutant responsible for the listing, and provide an individual control strategy (ICS) for

each source. The statutory language for section 304(l)(1) is as follows:

> "State list of Navigable Waters and Development of Strategies . . .
>
> (A) a list of those waters within the State which after the application of effluent limitations required under section 301(b)(2) of this Act cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 303(c)(2)(B) of this Act, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;
>
> (B) list of all navigable waters in such state for which the State does not expect the applicable standard under section 303 of this Act will be achieved after the requirements of sections 301(b), 306, and 307(b) are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 307(a);
>
> (C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source."

Waterbodies may be listed under section 304(l) because of storm water discharges associated with urban runoff, construction site runoff, mining runoff, or other runoff categories which contribute to a water quality standard violation. For waterbodies listed on the section 304(l)(1)(B) list, States or EPA must have identified the specific point source discharging the toxic pollutant by June 4, 1989. States must have developed an individual control strategy (ICS/NPDES permit) by June 4, 1989 or EPA in cooperation with States must have done so by June 4, 1990. If the storm water discharge does not have an NPDES permit that will control the point source and bring the waterbody into compliance with State water quality standards, then the discharge should be designated under section 402(p)(2)(E). After designation, the ICS should have been developed by June 4, 1990 in accordance with 304(l) regulatory requirements established on June 2, 1989 (54 *FR* 23868).

Paragraph (A)(ii) of section 304(l)(1) includes a listing of waterbodies which, after application of technology-based limits, fail to meet applicable water quality standards that assure the attainment of designated uses and the fishable/swimmable goals of the CWA. This list is comprehensive (i.e. it is not limited to waterbodies impaired by toxic pollutants); and where storm water discharges impair these listed waters, the storm water discharge should be considered for designation and permit issuance under section 402(p)(2)(E).

Example

The lower Duwamish River, which empties into the Puget Sound in Washington, has been categorized as having

extremely poor water quality partly attributable to metals contamination. The major causes of the river's condition are industrial discharges, polluted storm water discharges, overland runoff, and combined sewer overflows. As a result, the lower Duwamish River was originally included on Washington's section 304(l)(1)(B) list. As part of the Puget Sound Estuary Program's activities, storm water discharges were characterized for pollutant loadings of metals and organics. Several storm drains were listed due to metals contributions under section 304(l)(1)(C). Since the original listings were submitted, however, the State has suggested that storm drains be delisted. If any storm drains remain on the section 304(l)(1)(C) list, an ICS/NPDES permit will be developed. For storm drains not listed, additional information should be collected; and if this information shows a contribution to a water quality impairment, such storm water discharges should be designated for permitting under section 402(p)(2)(E).

B. Contribute significant pollutants to any waterbody segment listed under section 319(a)(1).

Many storm water discharges have traditionally been considered to be nonpoint sources of pollution because of their diffuse and intermittent nature. Legally, however, they are considered point sources if discharged from a conveyance. Section 319(a)(1)(A) of the CWA requires States to identify in Nonpoint Source Assessment Reports those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or goals and requirements of the CWA. Section 319(a)(1)(B) requires States to

identify those categories and subcategories of nonpoint sources which add significant pollution to navigable waters identified under section 319(a)(1)(A). These lists were required to be developed by States by August 4, 1988. Similarly, section 305(b) requires that water quality impacts from diffuse sources be identified. Discharges from storm water point sources may be classified in categories such as urban runoff or construction site runoff in these reports. The statutory language of section 391(a)(1) is as follows:

> "The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which:
>
> (A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of the Act;
>
> (B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;"

As previously stated, identifiable categories under section 319(a)(1)(B) may include discharges that are associated with urban runoff, construction site runoff, mining runoff, etc. (i.e., those categories that are identified in the State Nonpoint Source Assessment Reports). After a State's Nonpoint Source Assessment Report is approved by

the Regional Administrator, storm water discharges covered by section 402(p), which may be listed in the section 319 assessment that impact listed waterbodies, should be considered for designation under section 402(p)(2)(E).

Example

The Minnesota Pollution Control Agency lists Ryan Creek in its State Nonpoint Source Assessment Report as being impacted solely by storm sewers and surface runoff. The Report also lists Shingle Creek as being impacted by land development, storm sewers and surface runoff. Those storm water discharges that contribute to the impairment could be considered for designation and permitting under section 402(p)(2)(E).

C. Contribute significant pollutants to any waterbody segment listed under section 314(a)(1)(F).

As required by section 314, each State will conduct a two-part study to determine a lake's condition and develop methods and strategies for restoration and protection. Such information will specify the location and loading characteristics of significant sources polluting the lake. The statutory language appears in the following lines;

> "Each State on a biennial basis shall prepare and submit to the Administrator for his approval –
>
> (F) an assessment of the status and trends of water quality in lakes in such State, including but not limited to, the nature and extent to which the use of lakes is impaired as a result of such pollution, particularly with respect to toxic pollution."

In accordance with section 314(a)(1)(F), States have already submitted Lake Water Quality Assessment Reports. These reports, in many cases, document the impact of storm water discharges on lakes, and were included as part of the State 305(b) Report. Where this information is provided in an Assessment Report that has been approved by the Regional Administrator, any storm water discharges included in the section 314(a)(1)(F) assessment (such as urban runoff, construction site runoff, mining runoff, etc.) which impact a given waterbody should be considered for designation under section 402(p)(2)(E).

Example

In the 1988 Lake Water Quality Assessment Report, the Illinois Environmental Protection Agency lists Levings Park Lagoon, Winnebago County as being water quality limited and partially supporting of one or more designated uses with moderate impairment. The principal source of impairment has been identified as urban runoff. Therefore, discharges resulting from the urban runoff that impact the Levings Park Lagoon could be considered for designation under section 402(p)(2)(E).

2. SIGNIFICANTLY IMPACT SENSITIVE WETLANDS, DRINKING WATER SOURCES, ESTUARIES, LAKES, OR NEAR COASTAL AREAS THAT ARE HIGHLY VALUED NATURAL RESOURCES.

Under section 402(p)(2)(E), the Regional Administrator or State Director must determine whether a storm water discharge contributes to a violation of a water

quality standard or is a significant contributor of pollutants to waters of the United States. Based on such a determination, 402(p)(2)(E) designations should be considered for storm water discharges that significantly impact certain waters that warrant special consideration such as wetlands, lakes, scenic rivers/streams, high quality headwaters, estuaries, or coastal regions. Such waterbodies are often spawning, feeding, and nursery grounds for various species, and include sensitive habitats such as mangrove marshes, seagrass beds, and coral reefs. Storm water may enhance eutrophication of these water bodies, and contribute to an overall deterioration in water quality. BOD loads will generally lower the dissolved oxygen (DO) in receiving waters. Petroleum hydrocarbon loads in receiving waters may result from storm water discharges. Sediment loading from storm water runoff can settle to cover spawning habitat or can shade submerged vegetation and limit photosynthesis. Lakes and estuaries have long detention times and tend to concentrate nutrients, such as phosphorous and nitrogen, and other pollutants in the muds and water columns. Where such water bodies are significantly impacted by storm water discharges, these discharges should be considered for designation. The Regional Administrator or NPDES State Directors may use the Lake Water Quality Assessment Reports and other available information necessary to prioritize impacted waterbodies for discharge designation.

Example

The quality and productivity of the Chesapeake Bay and its tributaries have declined due to the impact of human activity that has caused increased levels of pollutants, nutrients, and toxics in the Bay system and declines in

protective land uses, such as forested and undeveloped lands. Shoreline areas of the Bay system are particularly sensitive and susceptible to adverse impacts due to storm water discharges. Where storm water discharges, such as urban runoff, construction site runoff, mining runoff, etc., have been determined to represent a significant source of pollutants to a segment of the Bay or a particular stream segment of a Bay tributary, the discharge could be considered for designation under section 402(p)(2)(E).

3. MUNICIPAL SEPARATE STORM SEWERS THAT ARE KNOWN TO HAVE OR SUSPECTED OF HAVING PROCESS WASTE OR SANITARY WASTES DISCHARGED TO THEM.

Studies have shown that many storm sewers contain illicit discharges of non-storm water. In some municipalities, illicit connections of sanitary, commercial and industrial discharges to storm sewer systems have had a significant impact on the water quality of receiving waters. Removal of these discharges presents opportunities for improvement in the quality of storm water discharges.

Under the proposed storm water permit application regulations, municipalities with separate storm sewers serving a population over 100,000 must submit a management plan that requires screening for illicit discharges and improper disposal. Municipal separate storm sewer systems with identified improper discharges that significantly impact receiving waters should be considered for designation under section 402(p)(2)(E). Once designated, the affected municipality will be responsible for submitting a permit application. The permitting authority may request the municipality to submit a description of a storm water management plan, or any aspect of a management

plan that may call for monitoring and screening for illicit connections and improper discharges. Such plans are to include subsequent measures for the removal and elimination of such known discharges. The following examples document cases where such problems existed and where improvement in water quality was achieved following the elimination of illicit connections. It is important to note that the section 402(p)(2)(E) designation authority can be used to require NPDES permits for any size municipal separate storm sewer system or specific discharges points within the system. This authority may be useful to address municipal separate storm sewer systems that serve populations of less than 100,000, since those cities are not required to file applications for storm water permits before October 1, 1992.

Example

One recent study performed in Ann Arbor, Michigan concluded that illegal and improper industrial and commercial point source connections to storm drains represents a significant source of pollutants in storm water discharges. Half of the businesses investigated in Ann Arbor had at least one storm drain connection through which potentially hazardous pollutants could enter the storm sewer. Significant improvements in water quality were realized as these connections were removed and the flows shifted to sanitary sewers. Over two-thirds of auto-related businesses such as repair shops, tire stores, service stations and body shops, and half of the car washes investigated had illegal or improper connections to the storm drainage system. Similar municipal separate storm water systems should be considered for designation under section 402(p)(2)(E).

Example

The City of Fort Worth has begun a surveillance program to curb illegal dumping of industrial and domestic waste into the city's estimated 200 storm drains that feed streams flowing to the Trinity River. Over a period of one year, 57 cases of illegal waste dumping by businesses and industries were investigated. Eighteen cases of improper connection of domestic sewage lines to storm drains were discovered. The city has implemented corrective measures and several citations have been issued to violators. The surveillance effort was initiated, after a series of devastating fish kills plagued the Trinity River. Monitoring has shown that diesel fuel, chemical solvents, pesticides, raw sewage and chlorine are present in storm water discharges. Similar storm water corrective measures could be required after the municipal system is designated under section 402(p)(2)(E).

4. MUNICIPAL SEPARATE STORM SEWER DISCHARGES THAT ARE SUSPECTED OF CONTAINING A SIGNIFICANT CONTRIBUTION OF POLLUTANTS.

The characterization of storm water discharges in terms of concentrations and pollutant loads viewed together with water quality standards and National Urban Runoff Program (NURP) data derived from typical urban runoff characteristics, provides an indication of whether the discharge is a significant contributor of pollutants. For instance, the mean concentration is defined as the total constituent mass discharge, divided by the total runoff volume for a rainfall event. These simplified approximations can be used as the basis for designation as a significant contributor of pollutants. Where such specific

information is lacking for a particular municipality, NURP data can be used to make initial screening estimates of pollutant loads associated with municipal separate storm sewers. Using the NURP recommendations for load estimates provided in Attachment A, pollutant loadings can be calculated for a range of pollutant concentrations. As municipal dischargers provide a more accurate estimate of pollutants based on site specific data and the use of more sophisticated models, such as the Storm Water Management Model (SWMM), pollutant concentrations and loads can be compared to NURP and other estimates. Based on the resulting characterizations, discharges from municipal separate storm sewer systems that contain a significant contribution of pollutants can be determined and, where appropriate, considered for 402(p)(2)(E) designation.

Procedures for Designation

On January 12, 1989, (54 *FR* 246), EPA published a final rule which codified portions of section 402(p), including section 402(p)(2)(E), into EPA regulation at 40 CFR 122.26(a). In addition to December 7, 1988 (53 *FR* 49416), EPA proposed revisions to procedures at 40 CFR 124.52 for designating storm water discharges on a case-by-case basis. Until EPA promulgates these regulations, procedures for case-by-case designations should be modeled after existing regulatory procedures at 40 CFR 124.52. The Regional Administrator, or in States with approved NPDES programs, the Director, will notify the discharger in writing that the discharge is being considered for designation and the reasons for the consideration. In addition, an application form is to be sent with the notice.

Until EPA promulgates specific permit application requirements for storm water discharges, operators of storm water discharges considered for designation under section 402(p)(2)(E) should generally submit Form 1 and Form 2C permit applications. For designation of discharges from a municipal separate storm sewer system, Form 1 and Form 2C applications for each outfall may not be appropriate. In this case, the permitting authority may request the applicant to submit information modeled after the permit application requirements for large and medium municipal separate storm sewer systems proposed in the December 7, 1988, notice.

Deadlines for submitting permit applications will be established on a case-by-case basis. Although a 60-day period from the date of notice for submitting a permit application may be appropriate for many designated storm water discharges, site specific factors may dictate that the Regional Administrator or NPDES State provide additional time for submitting a permit application. For example, due to the complexities associated with designation of a municipal separate storm sewer system for a system- or a jurisdiction-wide permit, the Regional Administrator or NPDES State may provide the applicant with additional time to submit relevant information or may require that information be submitted in phases.

Attachment B contains example reports from the "Waterbody System," which is an information system which retains the results of the section 305(b) reports. The 305(b) reporting process is a critical source of information for making determinations under the authority of section 402(p)(2)(E). The data system is now only partially implemented, but beginning with the 1990 305(b) reporting cycle should contain the assessment data for all States.

Regional Offices and States can use data from the 305(b) Waterbody System, the 1988 Lake Water Quality Assessment Report, and other available information characterizing storm water discharges to make determinations under the authority of section 402(p)(2)(E). The permitting procedures should commence as soon as the impact from storm water discharges is recognized. In addition, when industrial permits that regulate only non-storm water discharges expire, they should be evaluated to determine whether storm water discharges need to be addressed.

If you have any questions regarding this matter, please contact Cynthia Dougherty at FTS/202 475-9545 or have your staff contact Mike Mitchell at FTS/202 475-7057.

Attachments

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